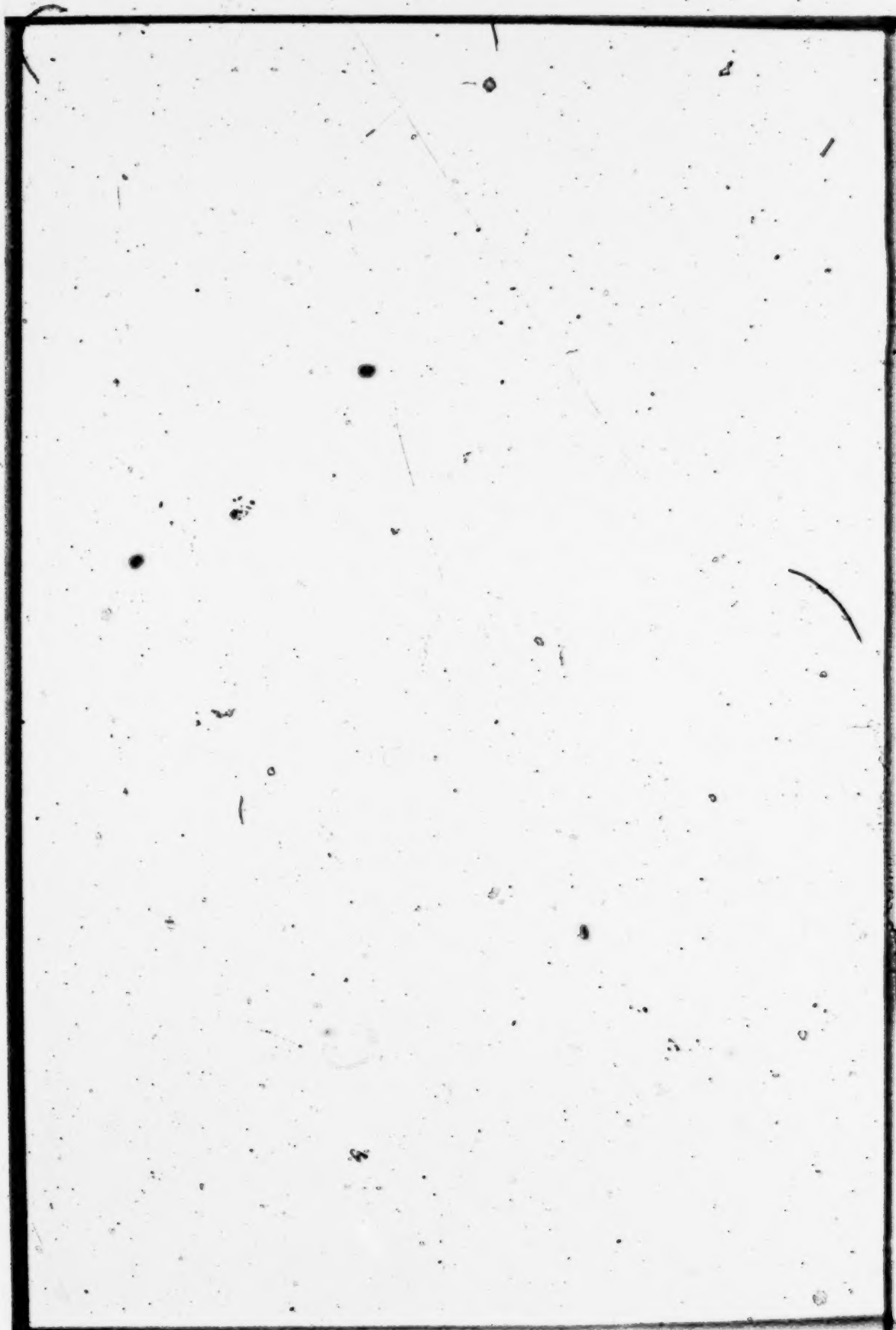

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No. 1046

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I

The Right To Challenge Our Standing To Sue Has Been Waived

The joint brief of the United States and the Interstate Commerce Commission[1] raises the issue of appellant's standing to sue. At the same time, it states incorrectly (p. 5), that the lower court "indicated its view that appellant lacked standing . . . but did not rest decision on this point . . ." As a matter of fact, the lower court,

[1] Hereinafter sometimes referred to as "government."

albeit begrudgingly, held that the question of appellant's standing to sue was not open, since this Court had ruled that it had such standing in *American Trucking Assns.* v. *United States*, 355 U.S. 141, 144 (1957). (Jurisdictional Statement 24, n. 2.) We submit it would have been more straightforward for the Government to admit that the lower court squarely held against it on this issue, and then to have criticized such holding, if it chose to do so. The issue was raised extremely belatedly by the Commission before the court below. It was not raised there at all by either of the intervening rail-subsidiary defendants. They have raised it initially in this Court in their motions to dismiss or affirm.

The complaint in this case was filed in the court below on April 8, 1964. Intervening rail-subsidiary defendants promptly answered, neither of them raising the issue of our standing to bring this action. The Commission, by orders of the District Court, obtained extentions of time within which to answer, until June 29, 1964. By order served June 25, 1964, the Commission, on its own motion, reopened its docket for reconsideration on the basis of the record already made. On June 26, 1964, the court below, at the request of the Commission, entered an order postponing all further proceedings. By report and order dated June 25, 1965, the Commission, division 1, on further consideration, took the action now before this Court for review.

Appellant, for the second time, exhausted its administrative remedies before the Commission and filed supplement to its original complaint December 13, 1965 (J. S. 5, 6). After extensions of time secured on behalf of the United States and/or the Commission, the latter finally filed its answer on April 12, 1966, more than two years after the filing of our complaint.[2] Even then, no challenge

[2] The United States filed answer April 13, 1966, in which it stated that it "neither admits nor denies the allegations [of the complaint]. The United States of America neither supports nor opposes the order of the Commission."

was raised to our standing to sue. Not until it filed its brief on the merits in the District Court, on July 14, 1966, did the Commission, for the first time, raise the issue of standing. We submit that it raised it much too late.

Rule 12(h) of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 12(h), provides that "A party waives all defenses and objections which he does not present either by motion . . . or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading . . ., and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Since the Commission failed to raise the affirmative defense of standing to sue by motion or in its answer to our complaint and amended complaint, and since there can be no disputing that the court below had jurisdiction over the subject matter of this suit, it is clear that the government has now waived the point.

This reading of Rule 12(h) is also in harmony with Rule 17(a), 28 U.S.C. Rule 17(a). That rule provides that "Every action shall be prosecuted in the name of the real party in interest . . . ." And the courts have held that the objection that the plaintiff is not the real party in interest must be made with "reasonable promptness" and may be waived by delay. *E. Brooke Matlack, Inc.* v. *Walrath*, 24 F.R.D. 263; Barron and Holtzhoff, *Federal Practice and Procedure*, § 382; *Moore's Federal Practice*, § 17.01. See *Fox* v. *McGrath*, 152 F. 2d 616; *Clark* v. *Chase Nat. Bank of City of New York*, 45 F. Supp. 820. Plainly, the government has been anything but prompt in challenging our standing to bring this suit. We

submit, therefore, that their procedural maneuver should be disallowed and the case decided on its merits.

Even if the above rules did not exist, as such, the government should not be allowed, at this time, to question our standing to sue, since it would be inequitable to permit it to do so. We filed our complaint over two years ago. The Commission should have raised its defense by a motion to dismiss at that time. This it failed to do; instead, it reopened the proceedings, not at our request but on its own motion, for further consideration, which required us to file further pleadings with the Commission and the lower court and to incur additional expenses. Now the government asks this Court, after all this time, to deprive us of our right to challenge the validity of the Commission's action. We submit that the principles of equity and fair play represent still another reason why the Court should disregard the government's argument at this late date.

II

Appellant Has Standing To Maintain This Action In Any Event

In addition to the fact that the government has waited much too long to urge that appellant has no standing to maintain this suit, its contention should not be upheld on the merits. Referring to this Court's *per curiam* order denying rehearing in the *NMFTA* case,[3] the government (p. 2, n. 1) argues that NMFTA[4] had an "independent statutory function in the scheme of the Interstate Commerce Act" which "appellant here" does not have. To the contrary, we submit that ATA meets the government's

[3] *National Motor Freight Traffic Assn.* v. *United States*, 372 U.S. 246.

[4] Which it misdescribes as a rate bureau. NMFTA is not a rate bureau at all, although rate bureaus were also involved as plaintiffs in the cited case.

designation at least as well, if not better, than NMFTA. As noted in the district court decision in the *NMFTA* case, 205 F. Supp. 592, 593 (1962), the plaintiffs therein were "all motor carrier associations whose members are individual carriers engaged in interstate commerce . . . ." Here, appellant is, as noted in the attached affidavit[5] of William A. Bresnahan, its Managing Director, a federation of affiliated state trucking associations, whose membership is "composed of those engaged in the transportation of freight, express or mail by highway vehicles . . . each member exercising the right of franchise in this corporation through such affiliated association in the manner determined by such association for the election of its Directors to American Trucking Associations, Inc." (Affidavit, p. 29).[6]

This Court held that individual member carriers of NMFTA and the rate bureaus were aggrieved by the Commission's order there. The motor carrier members of appellant are equally aggrieved at the cavalier treatment by the Commission of the important Congressional policy here involved. The fact is that, generally speaking, the same motor carriers which are members of NMFTA and rate bureaus, and which furnish the financial support which enables those organizations to function are also members of ATA, and provide its financial support. As the affidavit, p. 29, makes clear, there are, contrary to the claim at page 2 of the government's brief, motor carrier members of ATA, albeit such membership is achieved through membership in one of its affiliated state associations.

As noted in the affidavit, ATA is the owner of the National Motor Freight Classification, which is published

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[5] We filed a similar affidavit in the court below.

[6] Motor Transit, which, in its answer in the court below, specifically stated that it was a member of appellant has now, rather belatedly, discovered that it is not such a member after all (Br., p. 12).

by NMFTA as agent for the participating carriers. ATA, under its contract with NMFTA, prints, distributes and sells the Classification; and could, on specified notice, resume publication thereof as agent for the participating carriers. In addition, ATA owns and publishes the Motor Carriers' Explosives and Dangerous Articles Tariff, on behalf of almost 4,000 motor carrier participants, as required by the Interstate Commerce Commission. *Infra*, 30-31.

The affidavit demonstrates that ATA's representation of the independent motor carriers comprising the organized trucking industry is on a significantly broader basis than NMFTA's. It should be clear that if NMFTA is—as stated by this Court—a "proper representative[s] of the interests of [its] members,"[7] then *a fortiori*, the same thing is true of ATA. We submit that this Court, as shown by its order in *NMFTA*, is, in cases involving decisions of agencies such as the Interstate Commerce Commission, more interested in the proper interpretation and application of the law than in the precise status of the adversary parties. While such proceedings involve private rights, they often, as here, also involve public policies, the importance of which far transcends that of the decision to the litigants before the Commission. Surely the Commission should not be allowed to ignore the important Congressional policy involved here whenever motor carriers do not choose, for whatever reason, to insist that the Commission abide by it. This important public policy, when properly enforced, may incidentally benefit an independent motor carrier or carriers, but it is not something to be turned on or off, like a spigot, depending upon whether such carriers, in specific cases, choose to protest applications for authority by railroads or their affiliates. Indeed, even if ATA had not been a party to the proceeding before the Commission, and no independent motor carrier had protested the applications of the rail subsidi-

[7] *NMFTA* case, *supra*, 372 U.S. at 247.

aries, it was still the obligation of the Commission, which it ignored, to rigidly enforce the Congressional policy against allowing unrestricted grants of operating authority to railroads and their affiliates.

The *Associated Industries* case[8] clearly supports the right of ATA to bring this action. There, "a New York membership corporation, the members of which are New York industrial and commercial firms and corporations, many of which are substantial consumers of coal"[9] filed a petition to review orders of the Bituminous Coal Commission of the Department of Interior. Section 6(b) of the Bituminous Coal Act of 1937 authorized "any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party" to seek review by a petition in an appropriate United States Circuit Court of Appeals.[10] Respondents filed a motion to dismiss the petition,[11] which was "not based on any contention as to the general non-reviewability of the orders or their validity, but solely on the contention that, assuming them to be invalid and reviewable, petitioner is not the kind of person entitled to seek court review."[12] There, as here, the agency argued that plaintiff "is not a 'person aggrieved' by the orders."[13] In the course of a thoroughly detailed opinion, the court said (at 712-713):

> It is urged by respondents that, even if a consumer is a "person aggrieved," nevertheless the petition

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[8] *Associated Industries of New York State, Inc.* v. *Ickes, et al.*, 134 F. 2d 694 (2d Cir. 1943), cited by the government (p. 2).

[9] *Id.*, at 697.

[10] *Id.*, at 699.

[11] *Ibid.* It will be noted that, unlike the situation here, respondents, at the outset, filed their motion to dismiss. As already noted, this is the course which should have been followed by the Commission in this case.

[12] *Ibid.*

[13] *Ibid.*

> should be dismissed because there is nothing in the record below, and only a bare allegation in the petition here, showing that petitioner is itself a consumer. But petitioner is a membership corporation "formed for the promotion of the welfare of its members"; and respondents concede in their brief that, for the purpose of this motion, petitioner's membership consists of 1,356 persons, firms and corporations, including many who "purchase and consume substantial quantities (estimated at 15,000,000 tons for the year 1942) of bituminous coal produced in Minimum Price Area 1 * * * and which is shipped for sale and sold in Market Areas 2 and 4"; and (again for purposes of this motion) respondents concede that those members may well be affected by the respondents' orders which increase the minimum prices at which coal can be sold by code member producers in an area in which those of petitioner's members who are coal purchasers transact their business. Respondents, as already noted, permitted petitioner to become a party to proceedings before them on the basis that petitioner did represent consumers, and with evidence in the record of petitioner's membership; and respondents, in those proceedings referred to petitioner as a representative of consumers. We take that as an administrative finding by respondents that petitioner is vested with sufficient authority to represent its consumer members. Consequently, we do not regard as in point cases suggesting that, ordinarily, there may be doubt whether a membership organization can be permitted to sue on behalf of its members, absent specific authority to do so. (Footnotes omitted)

Just as the industry association in the cited case was, as noted by the court, "formed for the promotion of the welfare of its members," ATA, the industry association here involved, was formed for "the mutual improvement and advancement of the interests of those engaged in [the trucking] industry throughout the limits of the

United States." [14] Here, the members of ATA have as much interest, and "may well be, [as] affected by the [Commission's] orders" as were the industry members of the association plaintiff in the cited case. In short, the same reasons which supported the standing of the association to bring the complaint involved in *Associated Industries* [15] support ATA's standing to bring this action here.

Also supporting the right of appellant to maintain this suit is *National Coal Ass'n.* v. *Federal Power Commission*, 191 F. 2d 462 (D.C. Cir. 1951). There the Court of Appeals for the District of Columbia held that "a trade association of bituminous coal mine owners and operators," . . . "the United Mine Workers of America, a labor union of coal miners," . . . and "the Railway Labor Executives Association, whose membership is composed of the chief executive officers of twenty-one of the so-called standard railroad labor unions" had standing to maintain an action to set aside an FPC order granting a certificate of public convenience and necessity under § 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e), to construct and operate a natural gas pipeline. The court, referring to the *Associated Industries* decision, noted:

> It is unnecessary for us to undertake a reexamination at this time of what has already been done so well by Judge Frank in his comprehensive discussion of the considerable body of case law which has developed with regard to the problem of standing to challenge administrative orders. (191 F. 2d, at 464)

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[14] Affidavit, p. 30.

[15] Petition for a writ of certiorari was granted, 319 U.S. 739, but upon the suggestion of both parties to the suit that "the cause has become moot by reason of the expiration" of the Bituminous Coal Act, the Supreme Court vacated the order of the Circuit Court of Appeals and remanded the cause to that court "for such further proceedings as may be appropriate." 320 U.S. 707. This procedural action, however, in no way detracts from the validity of the reasoning of the appellate court in the *Associated Industries* case.

The dissenting opinion in the *National Coal* case points up the extent to which the majority went in allowing the maintenance of the action:

> It is to be especially noted that neither the National Coal Association nor the United Mine Workers of America alleged, nor was any effort made to prove, that a single miner or a single mine owner belonging to either of these associations would be in any way affected by the construction of this pipe line. They content themselves with allegations and proof that they do in fact represent among their members a high percentage of miners and mine owners. These parties have no standing whatever in court. (*Id.*, at 468)

Another case in which the Court of Appeals for the District of Columbia Circuit recognized the right of an association to sue in a representative capacity for its members is *MacArthur Liquors, Inc.* v. *The Palisades Citizens Ass'n, Inc.*, 265 F. 2d 372, 374 (1959), where the court found that the individual members of that association had sufficient interest to sue and that, therefore, "the association has standing to protect their interests."

Still another case which strongly supports appellant's standing to bring the instant suit is *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958). This Court held there that, even where an association asserted the personal constitutional rights of its members, and despite the doctrine that constitutional adjudication should where possible be avoided, the association was:

> the appropriate party to assert these rights, because it and its members are in every practical sense identical. The association, which provides in its constitution that "any person who is in accordance with its principles and policies * * *" may become a member is but the medium through which its individual members seek to make more effective the expression of their own views. (357 U.S. at 459).

If the N.A.A.C.P. has standing in court to assert the constitutional rights of its members, then we submit appellant has a right to assert in this Court, as it did before the Commission, the statutory rights of the regulated motor carriers it represents.

To quote Mr. Justice Jackson in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951):

> The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.

Section 220(a) of the Interstate Commerce Act, 49 U.S.C. 320(a), authorizes the Commission "to require annual, periodical, or special reports from all motor carriers, brokers, lessors and associations . . . ." Section 220(d), 49 U.S.C. 320(d), authorizes the Commission to "inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, brokers, lessors and associations. . . ." Section 220(e), 49 U.S.C. 320(e), defines "association" as an "association or organization maintained by or in the interest of any group of motor carriers or brokers subject to this part which performs any service, or engages in any activities in connection with any traffic, transportation, or facilities subject to this Act." The power to require associations to file reports and to inspect and copy their accounts, books, etc., was specifically requested by the Interstate Commerce Commission, and accomplished by amendment of § 220 in 1949, 63 Stat. 487. In a letter addressed to the Chairman of the Senate Committee on Interstate and Foreign Commerce, the Commission's Legislative Committee discussed the proposal (U.S. Cong. Serv. 1949, 1645):

> The associations or organizations of this kind are numerous. Among the ones best known are the As-

> sociation of American Railroads, the American Trucking Associations, Inc., and Freight Forwarders Institute. They include rate bureaus and similar organizations. Such associations are not at present subject to the provisions of the Interstate Commerce Act which authorizes us to require the filing of reports by common carriers and others. Manifestly, they occupy positions of public importance with respect to transportation and its regulation, and we believe that they might well be required to file reports.[16]

We submit that there is something incongruous in the Commission, on the one hand, telling the Congress that appellant, "manifestly [occupies a position] of public importance with respect to transportation and its regulation," and, on the other, telling this Court that appellant has no standing to vindicate its "manifest position of public importance" by maintaining the action here involved.

In responding to other contentions raised in appellees' motions to affirm we shall, for simplicity, clarity and convenience, separate them under the headings "Motor Transit" and "Transport Company," respectively.

III

Motor Transit

The Government's brief avers (p. 3), citing page 38 of our Jurisdictional Statement, that the Commission "found that Eastman needed Transit's service, particularly its less-than-truckload 'peddle service,'" and (n. 4) cites the

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[16] The Commission has used the power conferred by the amendment to § 220. By order of January 12, 1950, it directed plaintiff herein (as well as others) to file an "Association Special Report." This order was complied with by plaintiff by the filing with the Commission of the special report required, dated April 27, 1950.

description of "peddle service" contained in this Court's *Rock Island* opinion, 355 U.S. 141, 148, n. 9.[17]

It should be noted that the citation supplied by the Government's brief in no way supports the statement that the Commission found that Eastman "particularly [needed]" Motor Transit's "less-than-truckload 'peddle service' ". Indeed, nowhere else in the record can we find any evidence even remotely supporting the Government's statement.[18] We can only assume, reluctantly, that the misstatement is an attempt to shore up the Commission's completely unwarranted grant of unrestricted motor rights to the rail subsidiary, by making the unfounded assumption that what is involved (insofar as this carrier is concerned) is the same type of service which this Court found in *Rock Island* was not being performed by the independent motor carriers there, which in turn led this Court to uphold the Commission's action. If that were the fact—which it is not—this Court might be justified in holding that the independent motor carriers cannot or will not provide the service which the Commission allowed the rail subsidiary, Motor Transit, to perform here, a holding which the Commission itself never made.

Again, the government brief severely strains credulity with the bald statement (p. 7) that ". . . Eastman singled out its need for Transit's less-than-truckload service." The citation supplied by the government for this exag-

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[17] We use the same case nomenclature as in our Jurisdictional Statement p. 8, n. 6.

[18] In its report under review the division noted that the rail subsidiary had served Eastman's Chicago plant "as a distribution carrier on outbound traffic in an area Motor Transit serves under certain functionally unrestricted motor carrier authority." The division then noted Motor Transit "desire[s] to continue to serve Eastman at its new facilities at Oakbrook in the same manner that [it had] been serving it at Chicago." (J.S. 33). This—it hardly needs saying—doesn't at all fit the government's restricted description of Motor Transit's proposed operations as "less-than-truckload peddle service."

gerated statement is pages 5, 6, and 7 of Exhibit 3 of the record before the Commission, and the appendix thereto. This refers to the "canned testimony" of James R. Roney, Divisional Traffic Manager at Eastman's Midwestern Sales Division. Throughout his entire statement (7 pages), Mr. Roney never once "singled out" Motor Transit, either by name or by reference exact enough to assume that he was specifically referring to it, as distinguished from any of the twenty-eight independent motor carriers whose applications to serve Eastman were heard at the same time. At the end of Witness Roney's statement, he noted that Eastman supports "the applications of those carriers which are now regularly serving our Midwestern Sales Division, a list of which is attached hereto, Appendix A." That appendix contains a list of twenty-seven carriers [19] whose applications witness Roney stated Eastman was supporting and it does contain Motor Transit's name. This, we submit, affords about the flimsiest foundation imaginable upon which to support the government's absurd claim that "Eastman singled out its need for Transit's less-than-truckload service."

These instances in which the government finds its necessary, first, to misstate the nature of the service proposed by Motor Transit, and then, to grossly overstate Eastman's claimed need for its service,[20] demonstrate—better than anything we might say—the invalidity of the Commission's grant of authority to the rail subsidiary. Had there been even a scintilla of evidence in the record before the Commission to support a finding that the independent motor carriers were unable or unwilling to pro-

[19] Twenty-one typed names, plus six written in.

[20] As previously noted (J.S. 10, n. 9) Eastman did not even bother to file exceptions to the Examiner's report denying Motor Transit's application. Eastman's failure to act—even at that early stage of the proceedings—to aid Motor Transit's efforts to secure operating authority, hardly comports—despite the Government's labored efforts to show the contrary—with the idea that it was in any real need of Motor Transit's proposed service.

vide the service which Motor Transit proposed, it would not have been necessary for the government to have substituted for the evidence of record—or lack thereof—its extremely strained interpretations referred to.

Motor Transit's brief (pp. 7-9) attempts to find "special circumstances" in the extremely general testimony of an Eastman witness regarding the truck service needed by his company. Here again, there is nothing in the witness' quoted language (p. 8) which remotely suggests that Motor Transit's service—as opposed to that of any independent motor carrier operating in the same territory—is vitally needed. Motor Transit's brief attempts to bridge this gap by the flat statement (p. 7) that the "service [of independent motor carriers] is inadequate in the instant proceeding" because "the testimony of Eastman witnesses at the hearing [indicates] that the shipper needed the continued transportation services of the motor carriers which had been serving it at its Chicago plant, including Motor Transit." Motor Transit's claim is nothing more than an exercise in semantics. Any fair reading of the record here will show that the only "need" claimed by Eastman for Motor Transit's service was that Motor Transit had provided service for Eastman at its old plant in Chicago.

Motor Transit's brief quotes generously (p. 9) from the Commission's opinion in *Burlington Truck Lines, Inc. —Purchase—Pirnie*, 85 M.C.C. 363 (1960), in an attempt to support its decision here. We respectfully submit that all that *Pirnie* really proves is that the Commission is quite willing to ignore the Congressional policy against rail intrusion into the motor-carrier field, unless such carriers or their representatives oppose such efforts every step of the way.[21]

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[21] If nothing more, this demonstrates the wisdom of upholding our standing to sue here. Appellant has no reason to be concerned

Both the government and Motor Transit obviously recognize the infirmity of the Commission's action—that the unwillingness or inability of independent motor carriers to provide a needed service found to exist in *Rock Island* —is not present here. Each of them, therefore, suggests that other "special circumstances" justify the Commission's action. We answer, *seriatim*, the arguments made in the government brief (pp. 6-7), which includes all the points made in that of Motor Transit:

(1) *Motor Transit's application was not opposed by the twenty-eight independent motor carriers, and there was no indication that any of them were willing or able to take on the additional burden of replacing Transit's service.*[22]

As noted in our Jurisdictional Statement (pp. 12-13), this argument simply attempts to transfer the burden of proof from the shoulders of the rail-subsidiary applicant, where it belongs, to those of the independent motor carriers. It was Motor Transit's obligation to prove that "special circumstances" *do* exist; not that of the independent motor carriers or this appellant to show that they *don't*.

The attempt to make much of the fact that the independent motor carriers in this proceeding did not oppose the applications of the railroad subsidiaries—and the effort to substitute their inaction for a positive finding by the Commission of inadequacy of their service—shows a remarkable degree of naivete, and deserves comment. Here Eastman, the supporting shipper, controls the traffic and, *alone*, determines which motor carriers will share in it.

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over incurring the ill will of large shippers, such as Eastman Kodak here. As we point out, *infra*, independent motor carriers often do.

[22] For ease of separating the government's, and our argument, theirs is italicized.

It is, therefore, hardly as amazing as appellees would apparently have the Court believe that the independent motor-carrier applicants, which expected to share Eastman's traffic, did not oppose the applications of the rail-affiliate motor carriers and thus challenge Eastman's aim of receiving service at its Oakbrook plant from the same carriers which served its Chicago plant. In a recent case, *Riss & Co., Inc., Ext.—Dakota County, Nebr.*, 102 M.C.C. 336 (1966), the Commission, division 1, said:

> Here . . . the shipper support has been meaningless because the chief supporting shipper, Iowa Beef, used its promised support of individual carriers as a means of forcing withdrawal of protests between competing applicants, apparently in the hope of expediting these proceedings. *We are aware that Iowa Beef is not unique in resorting to this device, and this Commission has frequently stated that it is unwilling to rely entirely upon the shipper support in measuring public need.* Here, however, reliance upon the shipper support to force withdrawal of protests is completely transparent and the shipper support contains no other persuasive elements to explain the support of certain carriers and not of others. (Emphasis supplied.)

The Commission's report (J.S. 41) states that we assert, without record support, that "certain motor carriers do not oppose the present applications because of undisclosed pressures brought upon them by either applicants or their supporting shipper." The fact is that we have not been that blunt. What we attempted to do is indicate, as we have above, the subtle pressure which is always upon any motor-carrier applicant seeking the privilege of transporting the traffic of a large shipper such as Eastman not to take any action likely to displease that shipper. Whether that pressure is direct and "completely transparent," as in the cited *Riss* case, or indirect and of more subtle nature makes little difference. In either event

it is real, and it is there. And we submit that when, as here, the Commission finds that the mere absence of opposition by independent motor carriers to applications filed by rail subsidiaries—under the circumstances present here—justifies ignoring important Congressional policy, it is a sorry day indeed!

(2) *The shipper testified to a need for the service of all carrier applicants, including that of Motor Transit, and singled out its need for Transit's service.*

We have shown above that the claimed singling out by Eastman of a need for Motor Transit's service is a figment of the government's imagination, rather than a fact of record. And we noted in our Jurisdictional Statement (p. 10) that the desire of a large shipper for the services of a railroad's motor affiliate was held by this Court in *Pacific Motor*[23] to offer insufficient reason to breach the Congressional policy involved.

(3) *Motor Transit simply sought to provide Eastman with the same service at its Oakbrook plant as it had provided at the Chicago plant, and its proposed service "will not inject a new quantum of competition."*

If the reference to competition is intended to meet one of the criteria of the proviso of § 5(2)(b) of the Act (J. S. 78), i.e., that the Commission—before granting motor rights to a rail affiliate—must find that its action "will not unduly restrain competition," it should be enough to point out that the Commission could not meet the dominant requirement of the proviso here. In short, its grant of unrestricted authority to the rail subsidiary did not meet the proviso's requirement that its award "will enable [Motor Transit's rail parent] to use service by motor vehicle to public advantage in its [rail] operations."

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[23] *American Trucking Assns.* v. *United States*, 364 U.S. 1.

(4) *Only a "slight extension" of Motor Transit's existing authority is involved.*

This *de minimis* doctrine—to use the Government's designation—would, if approved, substantially defeat the Congressional policy here involved. Nowhere in the provisions of the statute which it administers is the Commission empowered to lower the bars against rail entry into the truck field merely because the authority sought is limited in distance. This new Government *de minimis* doctrine, if followed, would, to use the vernacular, result in the policy of the Act being "nibbled to death by a duck."

To sum up: If the Commission's grant of authority to Motor Transit is upheld, the "special circumstances" doctrine will have been reduced to a mere catch phrase. Any reason which the Commission can pry from the record before it can serve as an excuse to defeat the Congressional policy. Here, as in *Pacific Motor*, there was no finding by the Commission "that independent [motor] carriers were unable or unwilling to perform the same type of service as [the rail subsidiary]."[24] Recognizing this fatal flaw, appellees attempt to persuade this Court that almost any reason the Commission can "dig up"—including one which is based on an improper assignment of the burden of proof—should be sufficient to justify waiver of the policy of the Act here involved. Approval of this reasoning will be the surest way to consign the policy to limbo, and "open the door to approval of over-the-road . . . trucking by railroad subsidiaries . . . and . . . greatly attenuate the safeguards which have been painstakingly erected to prevent railroad domination of trucking."[25] To again quote *Pacific Motor*,[26] if the "safe-

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[24] 364 U.S., at 14-15.

[25] *Id.*, 15.

[26] *Ibid.*

guards are no longer needed . . . the pardoning power . . . belongs to Congress," not the Commission.

IV

Transport Company

Here again, the Government's brief strains to reach unjustified assumptions. Simply because the application filed by this rail subsidiary requested authority restricted "against the handling of traffic which has not had a prior, or will not have a subsequent, rail movement" the Government dignifies this as an "express stipulation" (p. 7). It doesn't explain what happened to this "stipulation" when the Commission, in effect, handed the paper in which it was contained back to the rail subsidiary, saying that it could already perform the service sought without any motor authority.

In our Jurisdictional Statement (pp. 13-21), we pointed out that the statute involved in no way justifies the favored treatment accorded the railroads, which are allowed to publish any terminal area they please, while motor carriers are restricted in their operations within such areas in every city, town and hamlet in the country. And we argued that the disparate treatment of these two transport modes could not constitute the "fair and impartial regulation" required of the Commission by the National Transportation Policy. For obvious reasons, we submit, the government brief doesn't really meet our contentions head on. It states—as everyone already knows—that terminal area operations are exempt from regulation under Part II of the Act (pp. 7-8). But it doesn't even attempt an answer to the $64,000 question: How can the Commission justify its highly favored treatment of the railroads in allowing them to prescribe their own terminal areas at the same time it strictly prescribes them for motor carriers? It sidesteps our contentions respecting

the gross favoritism shown the railroads by the statement that we have not been "foreclosed." We are told that we may challenge the terminal area prescribed for itself by the New York Central Railroad by a complaint before the Commission. (p. 8)

It should be obvious that the "relief" held out to us by the government is a snare and delusion. So long as railroads are allowed to name their own terminal areas, they have the immediate right to serve any new plant producing traffic they desire to haul by the simple expedient of including the point at which the plant is located—whether on their lines or not—within the "terminal area" of a point they serve. A motor carrier, on the other hand, which is not already certificated to serve the point at which the plant is located has to go through the time-consuming and expensive rigmarole of applying to the Commission for authority to serve it, which he may not even then acquire, depending on the quantum of service already available. Bearing in mind that there are literally thousands of points which railroads can include in their self-prescribed terminal areas, the "right" to complain to the Commission in individual cases—and assume the burden of proof—that a railroad has exceeded a reasonable "terminal area" in a tariff publication is an illusory one indeed.

Not long ago, the Commission dealt with a situation in which Railway Express Agency, a railroad subsidiary, by tariff publication, listed the Army's Tooele Ordnance Depot as a point within its Salt Lake City "terminal area," 36 miles away. Despite the distance involved and the fact that a "wide expanse of undeveloped wasteland separates the ordnance depot from Salt Lake City,"[27] the rail subsidiary enjoyed the privilege of serving the govern-

[27] *Barton Truck Line, Inc.* v. *Railway Express Agency*, 95 M.C.C. 625, 630 (Aug. 5, 1965).

ment plant for over two years,[28] while independent motor carriers not specifically authorized to serve the depot could not compete. To be sure, the Commission ultimately concluded that REA could not legally serve the depot, but in the interim period, as noted, REA continued to enjoy the traffic.

The question of whether REA should be confined to the same terminal areas as have been prescribed by the Commission for motor carriers and freight forwarders is now before the Commission in Ex Parte No. 242, *Express Company Terminal Areas.* In fact, the report of its hearing examiner, served August 25, 1965, recommends that REA's terminal area limits be so prescribed, and the matter is pending on exceptions and oral argument. In this connection, we note that another panacea offered in the government's brief for the problems resulting from the favored treatment accorded the railroads is the suggestion (p. 8) that we "may seek to initiate a rulemaking proceeding to define the terminal area," presumably that of railroads generally. We have recently done precisely that. In Ex Parte No. 242, cited above, this appellant, on May 15, 1964, filed a petition with the Commission to broaden the scope of the proceeding "to include consideration of the terminal areas of all carriers subject to Parts I and III of the Act," as well as that of REA. By order served July 21, 1964, the Commission denied our petition. The reasons set forth in the denial order was that the relief sought "would cause undue delay in the handling of the instant proceeding and otherwise is not warranted at this time." With all due respect, considering that Ex Parte No. 242 originated with a Commission order served April 13, 1964, and now, three years later, is still pending

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[28] We say "over two years" because the complaint of the independent motor carrier there involved was filed July 22, 1963 (*Id.*, 625). The Commission's report does not indicate how long before that date REA had been conducting the operations under its self-prescribed "terminal area" tariff.

on exceptions to the hearing examiner's report, we hardly see how including the question of defining rail and water carrier terminal areas would have resulted in much more delay than has already occurred. And what would be a more propitious time to undertake a proceeding looking toward meeting the pertinent standard of the National Transportation Policy?

In our Jurisdictional Statement (p. 15), we contended that if the service provided by Transport Company is, in effect, that of its rail parent, the latter should have to meet the certificate requirements of § 1(18) of the Act. The government's brief contains no response to this argument. That of Transport Company cites four cases which it contends demonstrate that we are not on sound ground. We refer to them briefly.

With respect to *New York Dock Ry.* v. *Pennsylvania R.R.*,[29] it should be enough to point out that the situation was the opposite of that here. There, as the appellate court noted,[30] the railroad involved "does not intend to invade new territory by extending its line of tracks . . . a foot beyond these present termini . . . but intends . . . to reach its patrons, present and prospective, within New York City—*territory which it now enters and which it now serves* . . ." (Our emphasis) Here, unlike the cited case, Transport Company's rail parent proposes to serve, through its subsidiary, patrons located at a point which it does not enter and does not serve, i.e., Oakbrook, Ill. In addition, and at least equally important, the case was decided at a time when the motor carriers were not subject to federal regulation, when there was no § 202(c) to rely on for the discrimination inherent in the Commission's decision here, and when there was no National Transpor-

[29] 62 F. 2d 1010 (1933). Cited at p. 7 of Transport Company's brief.

[30] *Id.*, at 1012.

tation Policy requiring fair and impartial regulation of railroads and motor carriers.

Transport Company's brief (p. 7) refers to the Commission's decision in *New York Central R. Co. Station at Jay Street Terminal*, 310 I.C.C. 211 (1960), as involving a similar situation to that here. We disagree. The proposed truck service there was to be performed, as noted in the appellate court's decision cited by Transport Company,[31] to a point served by the appellee railroad "for decades."[32] To again quote the court: "The service here proposed by the Central was designed at least in part, to enable it to reach the same part of Brooklyn formerly served in cooperation with the Jay St. Connecting Railroad."[33] So that there again the situation in the cited case was the opposite of that here.

In *Drayage And Unloading at Jefferson City, Mo.*,[34] cited in the excerpt from the *Jay Street Terminal* case quoted in Transport Company's brief (p. 7), the decision, as in the *New York Dock Ry.* case, was rendered prior to federal regulation of motor carriers. There a competing railroad, Missouri Pacific raised the issue of "whether it is unlawful for the M-K-T to publish rates to and from Jefferson City when its rails do not reach that point" (*Id.*, at 439). What is really pertinent in that decision is the following language (*Id.*, at 440):

> It is clear from the record that the corporate limits of Jefferson City do not include North Jefferson, and that the switching limits of North Jefferson do not embrace those of Jefferson City, or *vice versa*. Consequently, Jefferson City is not now, nor has it

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[31] *Long Island R.R. et al.* v. *New York Central R.R.*, 281 F. 2d 379 (1960).

[32] *Id.*, at 380.

[33] *Ibid.*

[34] 206 I.C.C. 436 (Feb. 2, 1935).

> ever been, a point on the rails of the M-K-T., and the service between that point and North Jefferson must be regarded as a road-haul service and not an accessorial terminal service.

Factually, the cited case seems to be on all fours with the situation here. And had the Commission applied the same standard here it would have held that the service involved was "road haul" and required certification before Transport Company could perform it.

To sum up: The Commission's decision is highly partial to railroads and their motor affiliates in their competitive battle with independent motor carriers. Its action is bereft of statutory support and violates its obligation, under the National Transportation Policy, to regulate these transport modes fairly and impartially. Only recently, the Commission has rejected an opportunity to equalize its treatment of these transportation antagonists.

As relief for the situation which results from the Commission's unequal treatment, the government says we are free to challenge—on a case by case basis—each and every rail tariff publication which, as here, allows its motor subsidiary to provide service within its self-prescribed "terminal area," service which is barred to independent motor carriers. In view of the relevant stricture of the National Transportation Policy, we submit that the government's position is legally untenable.

We seek only equality, not to overreach. We do not ask that railroads be limited to terminal areas smaller than those prescribed for motor carriers. It is only where the railroad's self-prescribed terminal area is beyond the area prescribed by the Commission for motor carriers that we have cause for complaint. To make it as clear as we can, we do not say that *any* use of trucks by railroads constitutes the extension of a line of railroad. We only say that where, as here, the Commission allows a railroad's motor subsidiary to perform operations to and

from a point it is not authorized to serve, and which its rail parent does not serve—on the basis that the truck service is an integrated part of its rail parent's line-haul service (J. S. 39)—it is only reasonable that the rail parent be required to conform to the requirements of § 1(18) of the Act. The Commission's decision here, which requires neither the rail parent, nor its motor affiliate, to obtain authority to serve the new location involved, certainly violates the certificate provisions of either § 1(18) or § 207. It likewise violates the requirement of the National Transportation Policy that the Commission fairly and impartially regulate the competing transport modes here involved. And in so doing it gives its stamp of approval to the very evil which it pointed out in its first decision (J. S. 52)—it enables Motor Transport (or any other railroad motor subsidiary in a similar situation) to "obviate the showing . . . of special circumstances . . . by the simple expedient of publishing a tariff . . ."

V

Conclusion

For the reasons set forth herein, as well as in our Jurisdictional Statement, this Court should note probable jurisdiction, reverse the decision of the court below, and remand the case to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

PETER T. BEARDSLEY
RICHARD A. MEHLEY
NELSON J. COONEY
1616 P Street, N.W.
Washington, D.C. 20036
Counsel for Appellant

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 28th day of April, 1967, I served copies of the foregoing document on the several parties herein, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with postage prepaid, to Honorable Thurgood Marshall, Solicitor General, Honorable Donald F. Turner, Assistant Attorney General, Howard E. Shapiro, Esq., and Jerry Z. Pruzansky, Esq., Department of Justice, Washington, D. C. 20530; and David G. Bress, United States Attorney for the District of Columbia, Washington, D. C.;

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Leonard S. Goodman, Esq., Assistant General Counsel, at the offices of the Commission, Washington, D. C. 20423;

3. On New York Central Transport Co., intervening defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its counsel, Herbert Burstein, Esq., 160 Broadway, New York, N. Y., and Joseph Rotwein, Esq., 1500 Massachusetts Ave., N. W., Washington, D. C.;

4. On Rock Island Motor Transit Company, intervening defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its counsel, Martin L. Cassell, Esq., and Thomas J. Megan, Esq., 139 W. Van Buren Street, Chicago, Illinois; and Walter J. Myskowski, Esq., 712 Ring Building, 1200 18th Street, N. W., Washington, D. C.

PETER T. BEARDSLEY

Affidavit of William A. Bresnahan

My name is William A. Bresnahan, and I am Managing Director of American Trucking Associations, Inc. (ATA). I am head of its staff, and have been since July 1, 1964. I have been continuously employed by ATA since February, 1938, in various capacities, including that of Director of Research, and Assistant Managing Director, except for the period from October, 1957, through September, 1960, when I was general manager of the National Automobile Transporters Association, an ATA Conference. ATA is the only nationally recognized representative of the organized trucking industry in the United States.

ATA is a national federation of fifty affiliated state trucking associations, each representing all classes and types of truck operation, and twelve conferences, each of which represents a special class or type of truck operation. As provided in the ATA By-Laws (Article VI):

> The membership of this corporation shall be composed of those engaged in the transportation of freight, express or mail by highway vehicles, together with such other persons as may be engaged in allied industries and all of whom are members of some one of the several affiliated associations, each member exercising the right of franchise in this corporation through such affiliated association in the manner determined by such association for the election of its Directors to American Trucking Associations, Inc.

ATA was incorporated under the laws of the District of Columbia on September 22, 1933, as a non-profit corporation. The following paragraph, contained in its certificate of incorporation, describes its purposes and functions:

> The particular business and objects of this corporation shall be, the education of those engaged in the industry of transporting property by means of motor vehicles, teams and drays on matters affecting the

operation of such motor vehicles, teams and drays, including safety facilities, safety devices and laws governing such operation, and otherwise. The purposes shall further be the mutual improvement and advancement of the interests of those engaged in such industry throughout the limits of the United States.

ATA staff activities are undertaken pursuant to the direction of its Board of Directors and Executive Committee, composed almost entirely of owners and officers of trucking companies located in all of the states and the District of Columbia. Among other activities, the staff is required, by direction of these governing bodies, to participate "in any proceeding wherein a railroad or its affiliate has applied for motor carrier authority which appears to exceed a bona fide auxiliary and supplemental service or which otherwise is deemed contrary to the expressed Congressional intent respecting rail operation of motor vehicles."

ATA, along with the National Motor Freight Traffic Association (NMFTA), participates in the compilation of the National Motor Freight Classification, which is solely owned by ATA, and which is filed with the Interstate Commerce Commission, Federal Maritime Commission, forty-six State regulatory commissions and three Canadian provinces. The Classification governs the rates charged by the approximately 5,300 motor carriers party thereto for the transportation of various commodities between points and places within the United States. ATA, under its agreement with NMFTA, can, on specified notice, resume publication of the classification as agent for the participating carriers.

ATA is the sole owner and publisher of the Motor Carriers' Explosives and Dangerous Articles Tariff, containing regulations promulgated by the Interstate Commerce Commission governing the transportation of explosives and other dangerous articles. Almost 4,000 motor car-

riers participate in this tariff. Although the number of commodities classified as "explosives" is relatively small, the number of so-called "dangerous articles" is quite large, comprising literally thousands of commodities. The Interstate Commerce Commission, by its Tariff Circular MF-No. 3, requires motor carriers authorized to transport explosives and other dangerous articles to publish, in tariff form, its rules governing such transportation. Through the medium of the Explosives and Dangerous Articles Tariff, ATA performs this obligation on behalf of the carriers party thereto.

ATA regularly participates in proceedings before the Interstate Commerce Commission, and occasionally before the federal courts, as a representative of the organized trucking industry and the regulated motor carriers which comprise it. Examples of proceedings before the Commission, of great importance to the trucking industry generally, in which ATA has recently participated, are: Ex Parte No. 230, *Substituted Service—Charges and Practices of For-Hire Carriers And Freight Forwarders*, involving the promulgation of rules to govern carrier practices in connection with trailer-on-flat-car (piggyback) transportation in interstate commerce; Docket No. 33440, *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains And Motor Vehicles*, an investigation into the causes of accidents of the type referred to in the title; and Docket No. MC-F-8505, *Lasham Cartage Co. and United States Freight Co.—Control —Seatrain Lines*, involving an effort by a holding company controlling almost forty percent of the freight forwarder traffic in the United States to acquire control of one of the two remaining Atlantic-Gulf Coast water carriers of property. Over the years, ATA has participated in literally hundreds of proceedings, of varying degrees of importance to the trucking industry, before the Commission.

Examples of court cases in which ATA has participated because of their importance to the organized trucking industry generally are: *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534 (1940), involving the question of exemption of employees of interstate motor carriers from the overtime provisions of the Fair Labor Standards Act; *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298 (1952), involving the validity of rules prescribed by the Interstate Commerce Commission to govern the leasing and interchange of equipment by motor carriers subject to its jurisdiction; *Frozen Food Express, Inc.* v. *United States*, 148 F. Supp. 399 (1956), aff'd. *sub nom.*, *American Trucking Associations, Inc.* v. *Frozen Food Express*, 355 U.S. 6 (1957), involving the question of the exemption from economic regulation by the I.C.C. under the provisions of Section 203(b)(6) of the Interstate Commerce Act of numerous categories of agricultural and meat and poultry products.

Examples of court cases in which ATA has participated in an effort to uphold the Congressional policy against rail entry into the field of motor transportation are: *American Trucking Associations, Inc.* v. *United States*, 326 U.S. 77 (1945), involving an order of the Interstate Commerce Commission granting numerous applications of the Seaboard Air Line Railway Co. to perform motor carrier service; and *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960), involving an order of the I.C.C. granting unrestricted motor-carrier rights to the wholly-owned subsidiary of the Southern Pacific Co.

ATA regularly represents the organized trucking industry of the United States before committees of the Congress dealing with proposed legislation of general interest to motor carriers of property, e.g., in the fields of highway taxation and federal size and weight standards, amendments to the Interstate Commerce Act, and coverage of motor-carrier employees under the Fair Labor Standards Act.

In addition to the activities heretofore referred to, ATA represents the trucking industry in several organizations whose activities are directly sponsored by, or closely coordinated with, agencies of the federal government other than the Interstate Commerce Commission.

ATA, on behalf of the motor-carrier industry of the United States, has entered into an "understanding" with the Military Traffic Management and Terminal Service (MTMTS) to provide "a basic foundation for the immediate and efficient utilization of commercial motor freight transport by *all* the military services (as represented by MTMTS) during mobilization, war, national or other emergencies." A similar understanding between A.T.A. and the General Services Administration is nearing execution. Under this agreement, ATA, as the national representative of the trucking industry, will cooperate with the government agency on a similar basis and for the same purpose with respect to government transportation (other than military) as set forth in the current understanding with MTMTS.

The Office of Emergency Transportation Unit of the new Department of Transportation is charged with the obligation to prepare a national plan for emergency preparedness, as a part of the national plan for civil defense and defense mobilization, under the direction of the Office of Emergency Planning. An executive reserve corps has been established by the Office of Emergency Transportation, for the purpose, among other things, of allocating transportation facilities in the event of war or other national emergency. ATA participates in the work involved as the representative of the organized trucking industry in the United States.

The President's Committee For Traffic Safety, established April 13, 1954, is composed of eighteen members appointed by the President from various walks of life. The Secretaries of Defense, Commerce, Labor, and Health,

Education and Welfare serve as *ex officio* members of the Committee. The Committee, on behalf of the President, is required, among other things, "to promote State and community application of the Action Program of traffic safety measures established by the President's Highway Safety Conference . . . [and to] develop effective citizen organization in the States and communities in support of public officials with Action Program responsibilities." Executive Order No. 10858, 25 F.R. 373 (1960). I am a member of the Committee's Advisory Council as well as its Executive Committee. In addition, ATA participates in the work of the Committee as the representative of the organized trucking industry through the Director of its Safety Department, who has been Chairman of two committees of the Advisory Council of the President's Committee for Traffic Safety (the Ad Hoc Committees on Driver Education and Government Employee Safe Driving Standards), and is a member of the Planning Committee of the Advisory Council.

The National Traffic and Motor Vehicle Safety Act of 1966, Public Law 89-563, provides, among other things, for the establishment of a National Motor Vehicle Safety Advisory Council (15 U.S.C. § 1393), and provides that the Secretary of Commerce "shall consult with the Advisory Council on motor vehicle safety standards," which the Secretary is empowered to establish. Jurisdiction over these provisions of law were transferred to the Secretary of Transportation by Public Law 89-670, establishing the Department of Transportation. The Advisory Council referred to has been appointed, and one of its members is the Director of ATA's Engineering Department.

The Highway Research Board operates under the auspices of the National Academy of Science-National Research Council, and receives financial support from private industry, and, in the form of research grants, from the States and the United States Bureau of Public Roads.

The membership of the Board's Executive Committee includes, *ex officio*, the Federal Highway Administrator and the Executive Secretary of the American Association of State Highway Officials. ATA represents the organized trucking industry in the work of the Board, through membership of several members of its staff on various project committees of the Board. ATA's Research Counsel is a member of the Board's Committees on Economics of Motor Vehicle Size and Weight and Intercity Highway Freight Transportation. The Director of ATA's Engineering Department is a member of the Board's Vehicle Characteristics Committee. In addition, the Director of ATA's Safety Department is a member of the Board's Highway Safety Research Committee.

Washington)
) ss.
District of Columbia)

William A. Bresnahan, being duly sworn, on his oath says that he is the Managing Director of American Trucking Associations, Inc., a corporation organized and existing under the laws of the District of Columbia, and that the matters and facts set forth in the foregoing affidavit are true.

/s/ William A. Bresnahan

Subscribed and sworn to before me, this twenty-sixth day of April, 1967.

(SEAL)

/s/ Harry E. Boot
Notary Public, D.C.

My Commission Expires Feb. 14, 1969

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

AMERICAN TRUCKING ASSN., INC. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 1046. Decided May 15, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.